

FILED
Court of Appeals
Division II
State of Washington
9/2/2020 1:04 PM

NO. 54335-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ROBERT JESSE HILL,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 19-1-03352-7

BRIEF OF RESPONDENT

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I. INTRODUCTION

Robert Hill arrived at Urban Bud Tacoma incoherent and visibly intoxicated. As a private business, Urban Bud exercised its discretion to deny Hill access to the store and told him to leave. Hill hopes to undermine his conviction for burglary in the first degree by arguing that he did not enter unlawfully because he had already crossed the threshold of the doorway before being told he could not enter the store. His argument fails, however, for three reasons: (1) Hill knew he was not allowed into the store because he did not have valid identification; (2) the security guard expressly denied Hill access to the store before Hill passed through the security screening station; and (3) Hill entered into a visibly private portion of the store. Due to the overwhelming evidence in this case, there was sufficient evidence that Hill entered Urban Bud unlawfully in order to commit a crime.

This Court should affirm Hill's convictions because Hill fails to establish any errors at the trial level that led to actual prejudice. The court properly investigated the allegations of juror misconduct. Any further investigation would have inhaled in the verdict. Based on the court's investigation, there is no indication of any juror misconduct as the alleged improper statement amounted to no more than heated debate. Further, Hill could not have been prejudiced by the alleged misconduct as the

complaining juror testified that she could continue to deliberate, and the jury had already reached a verdict on the three counts in question.

Likewise, the two allegations of prosecutorial misconduct were not improper and did not result in prejudice. In both instances, the alleged improper statement was a fair response to Hill's own closing remarks. The deputy prosecutor correctly pointed out that Hill's arguments were not supported by the evidence and testimony that the jury heard during trial. Since Hill fails to demonstrate any prejudicial error, the State humbly asks this Court to dismiss his claims and affirm his convictions.

II. RESTATEMENT OF THE ISSUES

- A. Did the court abuse its discretion in denying Hill's motion for a mistrial when the alleged juror misconduct inhered in the verdict and only amounted to heated debate?
- B. Should Hill's conviction for burglary in the first degree be affirmed when there was overwhelming evidence that he entered Urban Bud unlawfully?
- C. Did Hill prove that the prosecutor's statements were both improper and prejudicial when they fairly responded to Hill's own closing arguments?
- D. Should this Court remand for resentencing when there is no record that the trial court refused to consider Hill's request for a mitigated sentence and Hill failed to object at sentencing?
- E. Is Hill entitled to relief under the cumulative error doctrine when there was not an accumulation of prejudicial error?

III. STATEMENT OF THE CASE

A. Substantive Facts

On August 31, 2019, Robert Hill arrived at the Urban Bud marijuana dispensary around 8:30 PM. RP 410. Prior to arriving, Hill consumed at least five large beers and two shots of brandy. RP 426-29. Hill knew that Urban Bud required customers to show identification (I.D.) before allowing them to enter the store. RP 414. He did not have any identification, but he hoped to get special permission from the manager to enter the store. *Id.*

Alvaro Salaverry worked the security desk that day. RP 267. Salaverry noticed that Hill was under the influence of alcohol. RP 272. Salaverry told Hill that he was being denied entrance and asked him to leave the store. *Id.* Hill refused to leave leading to a physical altercation that ended in Hill smashing several of the store's display cases. RP 273-79.

Urban Bud had significant security measures including security fencing on the outside doors and windows, and an advanced security camera system that captured the incident from multiple angles. RP 211-20, 232-33; Ex. 31.¹ The video footage does not contain audio. RP 8-9, 319-20. Per the video footage, Salaverry was stationed at the security check-in station

¹ Exhibit 31 contains several files from various camera angles. Each of these files contains a live time stamp at the top of the screen. When referencing a specific camera angle, the State will refer to the camera angle followed by the time stamp. For example, "Ex. 31 camera 6 at 8:33:51" will reference camera angle 6 at 8:33:51 PM.

where he checked customers identification before allowing them to enter the store. RP 214; Ex. 31 camera 6 at 8:16:00-8:33:26. The security check-in station was positioned directly in front of the entryway. Ex. 31 camera 6. The right side of the check-in station was roped off to guide customers past the security station before entering the store. *Id.*

Hill entered Urban Bud at 8:33 PM. *Id.* at 8:33:51. Salaverry had stepped away from the security desk, but he returned less than a minute after Hill entered the store. Ex. 31 camera 6 at 8:34:44. Hill stopped at the check-in station and began writing on Salaverry's perimeter report paperwork. RP 268; Ex. 31 camera 6 at 8:34:02. The paperwork was clearly marked and not intended as a sign in sheet leading Salaverry to worry that Hill was under the influence. RP 268-69; Ex 1. Hill smelled of alcohol and could not provide a rational explanation for why he wrote on the security report. RP 272. Salaverry told Hill: "Sir, you're going to need to grab your bags and leave. We're not going to sell to you. You're under the influence. I smell alcohol." *Id.* Hill refused to leave despite Salaverry repeatedly gesturing for Hill to exit the store. RP 273; Ex. 31 camera 6 at 8:36:12-8:37:01.

Hill ignored Salaverry and attempted to walk past the security station into the store. RP 273-74; Ex. 31 camera 6 at 8:37:08. Salaverry grabbed Hill's back pocket and pulled him backwards, causing Hill to fall

to the ground. *Id.* Salaverry attempted to drag Hill out of the store. RP 274; Ex. 31 camera 6 at 8:37:10-8:37:33. Hill resisted and continued to try to crawl back into the store. *Id.*

Christian Muridan, Urban Bud's store manager, heard screaming coming from the front of the store. RP 202. He walked over and saw Salaverry on the ground struggling to restrain Hill. *Id.* Hill was screaming incoherently and smelled strongly of alcohol. RP 203. A second employee, Ashlyn Thomas, also approached after hearing loud screaming from the entryway. RP 345. When she approached, she saw Hill sprawled on the ground screaming because he had been denied access to the store. RP 346. Hill said that "people were against him because [they] were not letting him into the store." RP 346.

Muridan approached and told Hill that he needed to leave at least five times, but Hill did not respond. RP 203. After the second or third time, Muridan told Salaverry to let Hill up so that Hill could leave the store. RP 204. Salaverry got up, picked up Hill's personal items and placed them outside the front door of the store. Ex. 31 camera 6 at 8:38:05. Hill did not leave as requested. RP 204. Instead, Hill got up, pushed past the security station, and attempted to kick open the door to an employee only breakroom. RP 204, 216, 242, 276; Ex. 31 cameras 6 and 13 at 8:38:05-15. Salaverry tackled Hill just before he entered the breakroom, which was

visibly not open to customers. RP 348-49; Ex. 31 cameras 6 and 13 at 8:38:15-20.

Hill continued to fight and struggle as Salaverry attempted to subdue him on the floor of the breakroom. Ex. 31 cameras 6 and 13 at 8:39:10-30. While subdued, Hill told Salaverry: “you don’t know who the ‘F’ I am and I’m gonna F-ing kill you.” RP 283. Hill then bit down hard on Salaverry’s left forearm causing Salaverry to jump up quickly. RP 277-78; Ex. 31 camera 21 at 8:39:10-30. As Salaverry backed away, Hill kicked at his face and grazed his nose. RP 278. Hill then picked up a water jug and threw it at Salaverry. RP 278-79; Ex. 31 camera 13 at 8:39:30-41. Hill returned to the employee break room to pick up the water dispenser, which he threw into the middle of the store. *Id.*

Hill proceeded to kick and break multiple display cases because he was upset from the “emotional drama” of the situation. RP 196-97, 279, 424, 453; Ex. 31 camera 13 at 8:39:42-55. Hill caused the following damages: \$500 to the display case glass, \$120 for each of the two back panels, \$603.23 in damage to the display lighting, and \$2,730 in damaged product. RP 362-64; Ex. 40; Ex. 41.

Officers Mcrea and Patenaude responded to the scene. RP 339, 393. The officers observed a two-inch diameter bite mark to Salaverry’s left arm that was bloody and swollen (the injury was still present months later at the

time of the trial). RP 287, 340, 394; Ex. 30. Hill was uncooperative with the officers who eventually had to carry him out of the store. RP 341.

B. Procedural History

The State proceeded to trail on four felony charges: assault in the second degree, malicious mischief in the second degree, felony harassment, and burglary in the first degree. CP 39-41. The court's to-convict jury instruction for burglary in the first degree included both alternative means— (1) entering unlawfully, and (2) remaining unlawfully in a building. CP 166; WPIC 60.02. The court used WPIC 65.02 to define entering or remaining unlawfully in a building:

“A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public.”

CP 165. Hill did not object or make exceptions to either instruction. RP 474.

During closing arguments, Hill argued that he was guilty of the lesser included offenses of criminal trespass in the first degree and malicious mischief in the third degree. RP 500. Hill stipulated that he was told to leave the building and didn't leave. RP 506. Hill admitted that he caused the damage to the display cases, but argued that there was insufficient evidence that the amount was over 750 dollars because the

general manager, Errol Franada, did not keep accurate records and the State did not match the broken items to Franada's inventory of costs. RP 453, 512-13. There was no evidence or testimony presented at trial that Franada did not keep accurate records or that the items Hill broke did not match Franada's inventory of costs. RP 359-77.

Hill repeatedly argued that the lack of audio in the video represented a weakness in the State's case. RP 499, 507, 511, 513. Hill claimed that the absence of the audio meant that to accept the State's theory of the case, the jury must "believe everything that [the State] built upon the testimony of Mr. Salaverry." RP 499. Later, Hill argued: "again, there's no audio to go with the video, so there's nothing to support Mr. Salaverry's contention..." RP 507. Hill insisted that without audio on the surveillance footage, there is not enough evidence to convict Hill of felony harassment. RP 513. Hill argued that the lack of audio was "surprising" considering it was a state of the art security system. RP 503. There was no testimony at trial that the security system was state of the art, whether it was normal for such a system to have audio, or why a security system would not have audio.

In rebuttal closing argument, the deputy prosecutor responded to Hill's arguments regarding the lack of audio on the video: "I would submit to you that no audio in the video, there's lots of explanations. I mean nothing was brought out as testimony. Who knows what the regulations are." RP

515. Hill objected on the basis of speculation. RP 515-16. The court overruled the objection. *Id.* The deputy prosecutor made no further argument regarding the subject. RP 515.

The deputy prosecutor also responded to Hill's argument that Franada's record keeping was inaccurate:

"I would submit to you there's no evidence, other evidence, as to the value of the property or that these bongos were sold anywhere else. Certainly, they've all been damaged. The receipt shows with some—specifically shows the numbers, and Mr. Franada went through them in establishing the loss and the amounts. And there's no evidence to contradict that except for defense saying you should not take him as credible, and I submit that is not sufficient."

RP 515. Hill did not object to this argument at trial. *Id.*

The jury began deliberating around 3:00 PM on November 18, 2019. RP 540. They deliberated until 4:16 PM. CP 296. The jury resumed deliberations the following morning at 8:58 AM. *Id.* At 9:17 AM, the jury informed the judicial assistant, Ms. Andres, that they had two questions. *Id.* After consulting with the parties, the court responded to the jury questions at 10:10 AM. CP 297. At 10:42 AM, the jury informed Ms. Andres that they were deadlocked on one of the counts. *Id.* At 10:51 AM, Juror 2 told Ms. Andres that she wanted to leave because she did "not want to be talked to like that." *Id.* RP 534. The jury then took a 10-minute break. RP 534. After the break, Juror 2 reported that she had been threatened. RP 534. At that

time, the jury had already reached verdicts on three of the four counts. RP 537.

After consulting with the parties, the judge polled the jury with the question: “do you think that this jury can reach a verdict within a reasonable time on the remaining count?” RP 538-39. The jury unanimously said no. *Id.* At that point, the jury had been deliberating for roughly four hours. RP 540. The parties and the court agreed that the jury was deadlocked. RP 540-41. The parties agreed to voir dire Juror 2 regarding the allegations of juror misconduct. RP 534-36.

The court called Juror 2 out and asked her to provide more detail regarding the alleged threatening behavior. RP 542. Juror 2 stated that another juror (hereinafter “Juror X”) told her: “karma should come back at me, and someone should come to my house and do that to me, and she hopes that I am the next person that that happens to if I don’t agree with her.” *Id.* The court asked Juror 2 if she could continue to deliberate. RP 543. Juror 2 responded: “Yes, I can.” *Id.* There was no indication that Juror 2 hesitated or equivocated about her ability to continue deliberating. Both Hill and the State were given the opportunity to question Juror 2 further. RP 542-43. Hill asked, “And obviously, you felt threatened by this? RP 544. Juror 2 responded, “yes.” *Id.* Hill did not ask Juror 2 when the comments occurred

nor did he request the opportunity to interview other jurors regarding the allegations. RP 545.

Hill moved for a mistrial arguing that it was unclear when these comments occurred. RP 545. The court denied the motion for the mistrial. RP 546. The court noted that although they don't know the order the jury deliberated, the questions only came up that morning toward the end of the deliberations. *Id.* The court found that the comments did not taint the deliberations and stated that "it is [not] unusual for deliberations to get heated and people to say untoward things." *Id.* The court determined that replacing or discharging Juror 2 was unnecessary because she stated that she could continue deliberating and the jury had already reached a verdict on three of the four counts. RP 544.

The court brought out the jury to render their verdict. RP 548. The jury did not reach a verdict on assault in the second degree. *Id.* The jury found Hill guilty of malicious mischief in the second degree, felony harassment, and burglary in the first degree. *Id.* The court polled the jury. *Id.* Each juror indicated that this was the verdict of the jury and that it was their individual verdict. RP 548-49.

At sentencing, Hill requested an exceptional downward sentence under the basis that Salaverry initiated the physical contact. RP 561. The court provided Hill an opportunity to allocate. RP 562-04. During his

allocution, Hill apologized for going into Urban Bud, but stated: “I’m not sorry for biting Salaverry.” RP 562. The court explained to Hill that it found the video very concerning. RP 564. The court noted that Hill had been in and out of custody constantly over the last seven years and now had over nine felony points. RP 565.

The court asked Hill to comment on how this criminal behavior was going to stop. *Id.* Hill was unable to provide insight into how he would curb his criminal behavior. RP 565-67. After fully listening to Hill and his attorney’s request for the mitigated sentence, the court opted to follow the State’s recommendation of 87 months. RP 567. The court did not expound on its rationale for denying Hill’s request for a mitigated sentence. RP 567-73. Hill did not object nor request that the court expand on its rationale. *Id.*

IV. ARGUMENT

A. The trial court properly denied Hill’s motion for a mistrial because the alleged misconduct inhered in the verdict and did not interfere with the jury’s ability to deliberate

Hill’s allegations of juror misconduct should be dismissed for two reasons. First, the propriety of Juror X’s conduct should not be considered because it inhered in the verdict. Second, Juror X’s comment did not warrant a mistrial as it was not improper and amounted to no more than heated discussion. This Court should not review the scope of the trial court’s investigation because Hill failed to object at trial and cannot demonstrate a

manifest constitutional error. Regardless, the trial court properly inquired into the alleged misconduct and found that it did not interfere with the jury's ability to deliberate. Therefore, this Court should deny Hill's claims and affirm Hill's convictions.

1. The alleged misconduct should not be considered because it inhered in the verdict

This Court should not consider whether the alleged misconduct denied Hill a fair trial because it inhered in the verdict. The strong public policy behind protecting the secrecy of jury deliberations supports the longstanding Washington Supreme Court precedent of forbidding courts from considering information that reveals details of the jury's deliberation even when used to impeach a verdict. The allegations here inhered in the verdict because the facts revealed the views of both Juror 2 and Juror X regarding whether the State had proven one of the charges. Further, the alleged misconduct could not be rebutted without probing into the mental processes of the jury. Therefore, this Court should not consider the alleged misconduct and deny Hill's claim.

Public policy strongly supports the Washington Supreme Court's longstanding precedent of forbidding courts from considering information to impeach a verdict that reveals details of the jury's deliberations. The secrecy of jury deliberations is central to our jury system. *Long v. Brusco*

Tug & Barge, Inc., 185 Wn.2d 127, 131, 368 P.3d 478 (2016); *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 567, 397 P.3d 90 (2017). To protect this important national interest, “courts will not consider allegations of jury misconduct that inhere in the verdict.” *Lui*, 188 Wn.2d at 568. Therefore, this Court should only proceed to determine the effect the alleged misconduct may have had upon the jury if the court concludes that it did not inhere on the verdict. *See Long*, 185 Wn.2d at 132.

Case law recognizes two tests for determining whether facts in a juror’s declaration or testimony inhere in the verdict. *Long*, 185 Wn.2d at 131. Under the first test, any facts that are linked to a juror’s motive, intent, or belief, or describe their effect upon the rest of the jury, inhere in the verdict and cannot be considered. *Id.* Under the second test, the court cannot consider any facts that cannot be rebutted by other testimony without probing the mental processes of any juror. *Id.* If the alleged misconduct falls under either test, this Court should not consider it. *Id.*

A trial court’s determination that alleged misconduct inhaled in the verdict is reviewed for abuse of discretion. *Id.* The appellant bears the burden of proving the trial court abused its discretion. *State v. Ashley*, 186 Wn.2d 32, 39, 375 P.3d 673 (2016). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Arredondo*, 188 Wn.2d 244, 256, 394 P.3d 348 (2017) (“Abuse of

discretion’ means no reasonable judge would have ruled as the trial court did.”). The court’s comment—“I don’t think that it is that unusual for deliberations to get heated and people to say untoward things”—reveals that the court viewed the alleged misconduct as part of the deliberative process thereby inhering in the verdict. RP 546. The trial court did not abuse its discretion because both judicial tests demonstrate that the alleged misconduct inhered in the verdict.

The alleged misconduct inheres in the verdict because it reveals the motive, intent and beliefs of both Juror 2 and Juror X. Allegations of juror misconduct “inhere in the verdict” if the facts are related to any “juror’s motive, intent, or belief.” *Lui*, 188 Wn.2d at 568. The alleged misconduct in this case is based on a single comment from Juror X to Juror 2: “Karma should come back at me, and someone should come to my house and do that to me, and she hopes that I am the next person that this happens to if I don’t agree with her.” RP 542. From the statement, it is evident that Juror X and Juror 2 disagree over whether to convict Hill of a specific charge. RP 542. The phrase—“if I don’t agree with her”—indicates that Juror X was attempting to persuade Juror 2, albeit inartfully, that Hill was guilty of that count. *Id.* Hill even admits that the comment went directly to the viewpoint of the jurors when he argues that “[t]he threats were not based on a personal disagreement or general antipathy—they were based on Juror 2’s opinions

about the case itself.” Br. of App. at 17. Therefore, the facts of the alleged misconduct inhere in the verdict and should not be considered.

The timeline of the alleged comments further support that Juror X was attempting to convince Juror 2 of Hill’s guilt. Juror 2 made her complaint only after the jury told the judicial assistant that they had reached a verdict on three counts but were deadlocked on the final remaining count. RP 534; CP 296-97. The trial resulted in a hung verdict on the charge of assault in the second degree. RP 548; CP 188. This supports the common sense understanding of Juror X’s comment—that Juror X wanted to convict Hill of assault in the second degree while Juror 2 did not. Therefore, the alleged misconduct inhere in the verdict by directly commenting on the beliefs of both Juror 2 and Juror X.

The alleged improper comment also inheres on the verdict because the testimony of Juror 2 cannot be rebutted by other testimony without probing into the mental processes of other jurors. Alleged misconduct inheres on the verdict if the allegation “cannot be rebutted by other testimony without probing any juror’s mental processes.” *Lui*, 188 Wn.2d at 568. It would have been impossible for the court to have questioned Juror X about her statement without delving into the deliberative process of the jury because the comment was made in the midst of Juror X attempting to

change Juror 2's vote on a specific count. RP 542. Therefore, the alleged misconduct inhered in the verdict and cannot be considered.

2. Hill fails to prove that Juror X's comment was improper as it amounted to no more than heated discussion

Even if this Court finds that the alleged misconduct does not inhere in the verdict, it should still deny Hill's claim because he fails to show that Juror X's comment was so improper that it warranted a mistrial. A mistrial requires a clear showing of misconduct due to public policy favoring stable verdicts and the secret, frank and free discussion of the evidence by the jury. Courts have routinely held that heated discussion alone does not amount to juror misconduct warranting a mistrial. Even if this Court finds that Juror X's comment was improper, Hill fails to demonstrate it prejudiced his right to a fair trial because the jury had already reached a verdict on the three counts in question. Therefore, this Court should deny Hill's claims and affirm his convictions.

A mistrial is an extraordinary remedy that should only be granted upon a clear showing of misconduct that caused actual prejudice to the defendant's right to a fair trial. A clear showing of misconduct is required to "overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). The Washington Supreme Court has repeatedly held that trial courts should deny a motion for a mistrial

unless “the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). The party alleging juror misconduct bears the burden of proving that the alleged misconduct occurred. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Hill fails to meet this burden.

Trial courts have broad discretion in determining how to investigate accusations of juror misconduct and whether to grant a mistrial. *State v. Elmore*, 155 Wn.2d 758, 774, 123 P.3d 72 (2005). A trial court’s decision to deny a motion for a mistrial based on juror misconduct is reviewed for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). The court did not abuse its discretion in denying Hill’s motion for a mistrial as the allegation amounts to no more than heated discussion that does not constitute misconduct. Further, even if misconduct occurred, it did not prejudice Hill’s right to a fair trial.

The alleged improper comment does not constitute juror misconduct. Heated discussion or even personal derogatory remarks do not amount to jury misconduct warranting a new trial. In *Earl*, for example, this Court upheld the trial court’s denial of a mistrial for alleged juror misconduct when a juror allegedly verbally attacked another juror to the point that she experienced a “psychological crisis” and needed to be

removed from the jury. *Earl*, 142 Wn. App at 771-776. The allegations in *Earl* were far more severe than the current scenario where Juror 2 told the court that she could continue to deliberate despite the comments from Juror X. RP 543.

Similarly, courts have found that even intimidation or extreme pressure from other jurors is insufficient to warrant a mistrial based on juror misconduct. *U.S. v. Briggs*, 291 F.3d 958 (7th Cir. 2002) (denying a new trial after a juror stated that “she had been ‘intimidated’ by other jurors into finding [the defendant] guilty”); *U.S. v. Ford*, 840 F.2d 460, 465 (7th Cir. 1988) (denying a new trial despite jurors alleging there was “extreme and excessive pressure on individuals to change votes”). The pressure exerted by Juror X was far less severe than either *Briggs* or *Ford*. Furthermore, unlike *Briggs* or *Ford*, there is no indication that Juror 2 ever succumbed to the pressure of other jurors. Quite the opposite, the record suggests that Juror 2 was the holdout vote that led to a hung verdict on Hill’s charge of assault in the second degree. RP 534, 541-544; CP 296-97

Hill admits that there is no Washington case law supporting his argument that threats, let alone mere derogatory remarks, constitute juror misconduct. Br. of App. at 14. Instead, Hill attempts to distinguish *State v. Earl* by elevating Juror X’s remarks to an actual physical threat. *Id.* This is not supported by the record.

Juror X's statement is not a threat because there is no indication that Juror X actually intended to do any harm. "A 'threat' is a statement made where a reasonable person would foresee that the statement would be interpreted "as a serious expression of intention to inflict bodily harm upon [another]." *State v. Trey M.*, 186 Wn.2d 884, 894, 383 P.3d 474 (2016). Therefore, it typically requires language reflecting an actual intent to commit harm such as "I will hit you" or "if you don't agree with me something bad will happen to you." This is not the case here. Juror X attempts to put Juror 2 in the position of the victim by stating that "she *hopes*" that the same thing happens to Juror 2 and "someone *should*" come and do that to her. RP 542 (emphasis added). Hill relies on the fact that Juror 2 indicated that she felt threatened by the statement, but she never indicated that she believed Juror X would actually carry out the threat. RP 541-44. Hill fails to show that Juror X actually threatened Juror 2 rather than merely using overly heated and dramatic language.

Juror 2's subjective feeling that she was threatened is insufficient to show that Juror X actually committed juror misconduct. In *Anderson v. Miller*, for example, the Court denied a new trial for misconduct even though two jurors testified that they experienced severe emotional distress from abusive language and physical threats in the jury room. *Anderson v. Miller*, 346 F.3d 315, 324 (2nd Cir. 2003). The facts in *Anderson* are far

more severe than those claimed by Juror 2 who did not describe a negative emotional impact other than the fact that she felt threatened. RP 541-44. Juror X's comments must have had a negligible impact considering Juror 2 told the court that she could continue to deliberate without any apparent hesitation. RP 543. Therefore, Juror 2's comment that she felt threatened, on its own, is insufficient to prove that Juror X's comments rose to the level of actual juror misconduct.

Even if this Court finds there was juror misconduct, however, reversal is unwarranted because Hill's right to a fair trial was not prejudiced. A mistrial is only justified when jury misconduct causes actual prejudice. *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d 669 (1997) ("Not all instances of juror misconduct merit a new trial; there must be prejudice."). Prejudice may be presumed upon a showing of misconduct, but it can be overcome by an adequate showing that the misconduct did not affect the deliberations. *Id.* Here, Juror 2 clearly indicated to the judge that she could continue to deliberate signaling that the alleged misconduct did not interfere with her ability to deliberate. RP 543.

Furthermore, Hill could not have been prejudiced by the alleged misconduct because the jury had already reached a verdict on the three counts he is appealing. Juror 2 only notified the judicial assistant that she wanted to leave after the jury notified the court that it had reached a decision

on three of the four counts. RP 534; CP 297. It was 20 minutes after that interaction when Juror 2 notified the judicial assistant that she had been threatened. *Id.* Therefore, the record suggests that the alleged improper comment occurred in that 20-minute timeframe when Juror 2’s statement to the judicial assistant escalated from “she wanted to leave” to “she had been threatened.” *Id.* It is evident from this timeline that the jury had already reached their verdict on three counts when the confrontation between Juror 2 and Juror X occurred. If the jury had already reached a unanimous verdict on the three counts Hill was eventually convicted of, then any subsequent juror misconduct did not prejudice Hill regarding those counts. This is further supported by the testimony of each juror when the court polled them following the verdict. Each juror, including Juror 2, indicated that the verdict was the verdict of the jury as well as their individual verdict. RP 538-39. Therefore, any potential juror misconduct was harmless.

Hill’s argument that the alleged misconduct represents structural error that requires reversal without a showing of prejudice is not supported in case law. Br. of App. 21-22. Hill cites to *State v. Levy*² for the proposition that “[t]hreatening physical harm on a fellow juror—in order to intimidate that juror into changing her mind—is a ‘structural error.’” Br. of App. at 21.

² *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Levy, however, did not involve any allegations of juror misconduct, but rather found that judicial comments on the evidence do not constitute structural error. *Levy*, 156 Wn.2d at 725. Hill presents no authority to support the notion that actual threats, let alone simple heated jury discussion, constitute “structural error.” Instead, Hill provides cases where the court wrongfully dismissed jurors based on their views toward the merits of the case. Br. of App. at 21-22; see *State v. Berniard*, 182 Wn. App. 106, 123, 327 P.3d 1290 (2014) (“The remedy for improper dismissal of a deliberating juror is reversal and remand for a new trial.”)

The wrongful dismissal of a juror is far different than a court’s denial of a motion for a mistrial. Dismissing a holdout juror based on his or her views on the merits of the case “would violate the right to a unanimous jury verdict because it would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case.” *Elmore*, 155 Wn.2d at 771 (2005) (internal quotations omitted). This concern is not present in Hill’s scenario where the court simply denied his motion for a mistrial and accepted the verdict from the original 12 jurors. Hill received a unanimous jury verdict on all counts as demonstrated by the court’s polling of the jury. RP 548-49.

Instead of a “structural error” analysis, courts employ a harmless error standard to determine if a defendant was prejudiced by alleged juror

misconduct. *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009). A finding of misconduct alone does not automatically mean that a “juror has manifested unfitness to serve on the jury as required under RCW 2.36.110.” *Id.* Rather, this Court should look to the misconduct to determine if the juror’s ability to deliberate was compromised. *Id.* Here, Juror 2 unequivocally stated that she could continue to deliberate. RP 543. Therefore, Juror X’s comment did not interfere with Juror 2’s ability to deliberate, Hill was not prejudiced by any alleged misconduct, and the trial court did not abuse its discretion in denying Hill’s motion for a mistrial.

3. This Court should not review the scope of the trial court’s investigation because Hill failed to preserve the issue

This Court should deny review of Hill’s claim of error to the scope of the trial court’s investigation because he failed to preserve the issue by objecting at trial. Hill’s claim is not of constitutional magnitude because there is no constitutional right to an evidentiary hearing into intrinsic juror misconduct. Further, any error is not manifest as Hill cannot demonstrate that additional investigation would have altered the outcome of the trial. Even if this Court opts to grant review, however, it should find the trial court properly investigated the allegation. Hill fails to show that the trial court abused its discretion in limiting the scope of this investigation when neither

party requested additional follow up. Therefore, this Court should deny Hill's claim and affirm his convictions.

This Court should deny review of Hill's claim absent a showing of manifest constitutional error. Ordinarily, appellate courts will not consider an issue that a party raises for the first time on appeal unless it is a manifest error affecting a constitutional right. *State v. A.M.*, 194 Wn.2d 33, 38, 448 P.3d 35 (2019); RAP 2.5(a)(3). Under RAP 2.5(a)(3), "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In other words, if an issue is not raised at trial, the appellant must "identify a constitutional error and show how the alleged error actually affected [his] rights at trial." *Id.* Only if an appellant proves an error that is both constitutional and manifest does the burden shift to the State to show that the error is harmless. *Id.* At trial, Hill did not object to the scope of the court's investigation into the alleged misconduct. RP 533-47. Therefore, Hill must prove that the scope of the trial court's investigation represents manifest constitutional error. RAP 2.5(a)(3).

Hill fails to prove that the scope of the trial court's investigation is of constitutional magnitude. "A defendant cannot simply assert that an error occurred at trial and label the error 'constitutional'; instead, he must identify an error of constitutional magnitude and show how the alleged error actually

affected his rights at trial.” *State v. Grimes*, 165 Wn. App. 172, 186, 267 P.3d 454 (2011). To determine if the error is “constitutional,” the courts look to the asserted claim and determine, if true, whether it implicates a constitutional right as opposed to some other form of trial error. *O’Hara*, 167 Wn.2d at 99. Here, Hill argues that this violated his right to an impartial jury, which would constitute a constitutional right. Br. of App. at 21. The allegation regarding the scope of the court’s investigation, however, does not implicate the right to an impartial jury, but rather the ability to *investigate* a juror for alleged misconduct.

An evidentiary hearing is not constitutionally required in every circumstance where allegations of juror misconduct are raised. In *Tanner v. United States*, for example, the Supreme Court held that the trial court’s failure to hold post-verdict hearings into allegations that jurors consumed alcohol and drugs during the trial did not violate the defendant’s Sixth Amendment right to a fair and impartial jury. *Tanner v. U.S.*, 483 U.S. 107, 108, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); U.S. CONST. amend. VI. The Court distinguished cases involving an “extrinsic influence” from cases involving an inquiry into the “internal process of the jury.” *Id.* at 120. The line of cases following *Tanner* followed this distinction in holding that hearings to investigate allegations of juror misconduct are only required where there is an allegation of an extrinsic influence on the jury. *Smith v.*

Nagy, 962 F.3d 192, 200-01 (6th Cir. 2020); *Briggs*, 291 F.3d at 963. Since there is no constitutional right to an investigatory hearing regarding intrinsic allegations of juror misconduct, Hill’s objection to the scope of the court’s hearing cannot possibly implicate a manifest constitutional right. *See Godoy v. Spearman*, 834 F.3d 1078, 1090 (9th Cir. 2016) (finding that the trial court reasonably denied defendant’s request for an additional evidentiary hearing regarding allegations of juror misconduct).

Even if this Court determines that the alleged error is of constitutional magnitude, Hill must also demonstrate that the error was manifest and resulted in actual prejudice. *O’Hara*, 167 Wn.2d at 99. “To demonstrate actual prejudice, there must be a “plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). In other words, Hill would have to make a plausible showing that additional investigation into the alleged juror misconduct was likely to alter the outcome of the trial. There is nothing in the record to support this claim as the jurors had already reached a verdict on the three counts Hill now challenges. RP 534-37. Therefore, there is no manifest error, and this Court should deny review under RAP 2.5(a)(3).

If this Court opts to consider this issue, it should find that the trial court did not abuse its discretion by conducting a limited inquiry into the

allegations of potential juror misconduct. Where there is potential juror misconduct, “the trial judge is faced with a ‘delicate and complex task,’ in that he or she must adequately investigate the allegations, but also must take care to respect the principle of jury secrecy.” *Elmore*, 155 Wn.2d at 761. Due to the difficulty of investigating allegations of juror misconduct while maintaining the sanctity of jury deliberations, trial courts are given broad deference in how they investigate allegations of juror misconduct. *Id.* at 773. Appellate courts review a trial court’s investigation into juror misconduct for abuse of discretion. *Earl*, 142 Wn. App. at 774; *Elmore*, 155 Wn.2d at 761. The trial court did not abuse its discretion to limit the scope of inquiry into jury misconduct because the allegations went to the substance of the jury’s deliberations.

The court’s investigation into Juror 2’s allegations of juror misconduct was sufficient. RCW 2.36.110 creates an ongoing duty for the judge to excuse jurors who manifest unfitness to serve as a juror. Although Juror 2 indicated that she felt threatened by Juror X’s comment, she indicated that she was able to continue to deliberate. RP 543. Therefore, there would be no reason to excuse Juror 2. Likewise, Juror X’s alleged comment, even if taken as accurate, was not misconduct and would not create a basis for excusal under RCW 2.36.110. Even had the court found it was misconduct, it would not warrant a mistrial as the typical first response

to alleged juror misconduct is to resolve the problem by reinstructing the jury. *See, e.g., Elmore*, 155 Wn.2d at 774 (finding that if a juror accuses another juror of refusing to deliberate the trial court should first attempt to resolve the problem by reinstructing the jury).

The court did not abuse its discretion in limiting the scope of the investigation in order to protect the sanctity of the jury process. The investigation was sufficient as it revealed that Juror 2 was able to continue to deliberate. There was no misconduct as the statement was merely heated discussion and there is no indication that Hill's right to a fair trial was prejudiced in any way. Therefore, this Court should dismiss Hill's claims and affirm his convictions.

B. The State presented overwhelming evidence that Hill entered Urban Bud unlawfully

The evidence, when viewed in the light most favorable to the State, is sufficient for a reasonable juror to find that Hill unlawfully entered Urban Bud. Urban Bud is a privately owned business that is only partly open to the public as demonstrated by its security protocol requiring valid identification before granting customers entrance. Hill entered the store unlawfully when he knowingly violated these security protocols, pushed past security, and kicked down the door to the private employee break room. Therefore, Hill's conviction for burglary in the first degree should be affirmed.

For alternative means crimes, express jury unanimity is not required. The Washington Constitution guarantees criminal defendants the right to a unanimous jury verdict. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); WASH. CONST. art. I, § 21. For alternative means crimes, however, “express jury unanimity as to which means is not required” so long as there is sufficient evidence to support each of the alternative means of committing the crime. *Id.* “Enters unlawfully” and “remains unlawfully” are alternative means of committing burglary in the first degree. *State v. Klimes*, 117 Wn. App. 758, 768, 73 P.3d 416 (2003). The State pled and argued both of these alternative means to the jury, and the jury did not specify which of the alternative means it relied upon to convict Hill. CP 40, 112, 192; RP 491. Therefore, there must be sufficient evidence that Hill both entered Urban Bud unlawfully and remained unlawfully. Hill only challenges the sufficiency of the evidence that he entered unlawfully. Br. of App. at 23.

When reviewing whether the State presented sufficient evidence that Hill entered Urban Bud unlawfully, this Court must view the evidence in the light most favorable to the State. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). A challenge to the sufficiency of the evidence “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Johnson*, 188 Wn.2d 742, 762, 399 P.3d 507 (2017). Therefore, when a criminal defendant challenges the sufficiency of the

evidence, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Scanlan*, 193 Wn.2d 753, 771, 445 P.3d 960 (2019). Deference must be given to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Trey M.*, 186 Wn.2d at 905. Here, the State provided overwhelming evidence that Hill unlawfully entered Urban Bud.

Hill entered Urban Bud unlawfully when he entered the store without valid identification. “A person ‘enters or remains unlawfully’ in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(2). Urban Bud is a private business that is only partly open to the public. As a marijuana dispensary, Urban Bud requires its customers to show identification before allowing them to enter the store. RP 214. Hill admitted on the stand that he knew he had to show identification before being granted access to enter the store. RP 414. Hill didn’t have identification but hoped to get special permission from the manager to enter the store. RP 414, 437. Hill entered Urban Bud unlawfully because he knew he did not have permission to enter the store without valid identification. RCW 9A.52.010(2).

Urban Bud was a privately owned business that had the authority to deny or limit Hill’s access to the store. It is long held that “[a] private

property owner may restrict the use of its property so long as the restrictions are not discriminatory." *State v. Bellerouche*, 129 Wn. App. 912, 915, 120 P.3d 971 (2005); *State v. Kutch*, 90 Wn. App. 244, 247, 951 P.2d 1139 (1998). Although the initial entrance way (the area between the door and the security station) was open to the public, Urban Bud used ropes and a security station to physically demonstrate that customers required permission before entering the main portion of the store. RP 214; Ex. 31 camera 6 at 8:16:00-8:33:26. Therefore, even if Hill had permission to enter the front door, that permission only extended to the roped off security station where Urban Bud checked customers identification.

Hill's reliance on *Klimes* is misplaced because Urban Bud is not fully open to the public and Salaverry expressly revoked any potential permission to enter the store. The Court in *Klimes* stated in *dicta* that a person "who enters the store through a public entrance while the store is open for business is licensed, invited, or otherwise privileged to enter or remain." *Klimes*, 117 Wn. App. at 760. The Court noted, however, that the privilege to enter or remain does not extend to a person whose invitation to enter or remain has been withdrawn. *Id.* Furthermore, a marijuana dispensary that checks identification before allowing customers into their store is vastly different than the junkyard in *Klimes*, where customers were allowed to enter and roam unattended. *Id.* at 761. Even if Hill had implied

permission to enter the store based on Urban Bud's status as a public business, that implied permission was expressly revoked by Salaverry before Hill rushed past the security station to break the display cases. RP 272. Therefore, Hill unlawfully entered Urban Bud by pushing past the security station.

Even if Hill had permission to pass through the store's security, that permission does not extend to private areas of the store such as the employee only break room. Under the statutory definition for "enters or remains unlawfully," a "privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public." RCW 9A.010(2)(a); *See State v. Collins*, 110 Wn.2d 253, 261, 751 P.2d 837 (1988) ("[A] limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case."). The evidence is undisputed that the employee break room was visibly not open to the public. RP 204, 218-19. As stated by Thomas: "Anybody that's been in a retail store would know that it's not supposed to be there for everybody." RP 348. Therefore, Hill also entered Urban Bud unlawfully by breaking into the private employee breakroom.

Hill knew that he did not have permission to enter Urban Bud because he did not have identification. Even if he did, Salaverry expressly

revoked that permission before Hill unlawfully bypassed Urban Bud's security station. Furthermore, he exceeded the permission of lawful customers by breaking into the employee only breakroom. Therefore, the State presented sufficient evidence, when viewed in the light most favorable to the State, for a rational trier of fact to find that Hill entered Urban Bud unlawfully.

C. The deputy prosecutor's statements in closing argument were neither improper nor prejudicial

Hill fails to show that the deputy prosecutor's remarks during rebuttal argument were either improper or prejudicial. The State was entitled to respond to Hill's closing remarks and point out that they were not supported by the evidence admitted at trial. In the first instance,³ Hill failed to preserve the issue with a timely objection and cannot show that the remark was so flagrant and ill-intentioned that it caused enduring prejudice that could not have been cured by an admonition to the jury. In the second instance, Hill fails to show that the alleged misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Therefore, this Court should deny Hill's claim and affirm his convictions.

³ The first instance refers to the deputy prosecutor's comments regarding the amount of damages to the store. RP 515. The second instance refers to his comment regarding the lack of audio on the security footage. RP 516.

To prevail on a claim of prosecutorial misconduct, a defendant must prove *both* (1) the prosecutor's conduct was improper, and (2) that the defendant was prejudiced by the comments. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *State v. Scherf*, 192 Wn.2d 350, 393, 429 P.3d 776 (2018). Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014); *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (“The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant’s right to a fair trial.”)

The deputy prosecutor’s remarks properly responded to the arguments Hill made in his closing statement. When analyzing whether a prosecutor’s statement was improper, courts do not look at the statement in isolation, but rather view it in the context of the larger argument in light of the issues of the case, the arguments made by opposing counsel, the evidence addressed in argument, and the instructions given to the jury. *Scherf*, 192 Wn.2d at 394; *Emery*, 174 Wn.2d at 764 n. 14. A prosecutor is entitled, for example, to point out the improbability or lack of evidentiary support for a defense theory of the case. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Likewise, during rebuttal argument, the prosecutor “is entitled to make a fair response to the arguments of defense counsel.” *State v. Gregory*, 158 Wn.2d 759, 842, 147 P.3d 1201 (2006). Courts jealously guard the ability of prosecutors to respond to defense arguments to the point that “even improper

remarks by the prosecutor are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *State v. Weber*, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006).

Both of the statements in question were fair responses to arguments Hill made in his closing remarks. In the first instance, Hill admitted that he damaged the display cases, but argued that there was insufficient evidence that the amount was over 750 dollars. RP 512-13. Hill attacked the reliability of Franada’s record keeping system and challenged whether or not he included items that were actually broken. *Id.* In response, the deputy prosecutor rightly pointed out that Hill’s argument was not supported by the record: “as to the value of the property...there’s no evidence to contradict that except for defense saying you should not take him as credible.” RP 515. That is a proper and valid response to Hill’s initial argument.

The prosecutor’s following statement—“I submit that is not sufficient”—is not shifting the burden of proof, but rather pointing out that Hill’s argument that Franada’s testimony is untrustworthy is not supported by the evidence that was admitted during trial. An argument that the “defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.” *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009). In *State v. Gauthier*, for example, the Supreme Court

found that the prosecutor did not shift the burden by stating that there was “not one iota, one piece, one shred of evidence, besides the testimony of this man” that the victim worked as a prostitute. *State v. Gauthier*, 189 Wn. App. 30, 36, 354 P.3d 900 (2015). Much like in *Gauthier*, the prosecutor’s comment—“this is not sufficient”—is not transferring the burden of doubt to the defense, but rather reminding the jury that they must base their verdict on the testimony and evidence presented at trial. That is a proper argument on the law and the court’s instructions.

Similarly, the prosecutor’s comment regarding the lack of audio in the security footage properly responded to Hill’s statements in closing argument. In closing, Hill repeatedly argued that the lack of audio represented a hole in the State’s case that undermined the credibility of several key witnesses. RP 499, 507, 511. Hill went so far as to claim that the absence of the audio meant that the jury must “believe everything that [the State] built upon the testimony of Mr. Salaverry” in order to accept the State’s theory of the case. RP 499. Contrary to Hill’s allegation that the prosecutor encouraged “the jury to speculate about why the security video lacked audio,” (Br. of App. at 27) it was actually Hill that first invited this speculation when he stated in closing: “...what appears to be a state of the art multi-camera video surveillance system. Again, *surprisingly*, no audio.” RP 503 (emphasis added). Hill made all of these arguments even though there was no evidence or testimony presented at trial on why the video did not include audio.

Hill's argument that the prosecutor wrongfully introduced evidence is not supported by the record. The prosecutor did not introduce any specific explanation. *Id.* Quite the opposite, the prosecutor reminded the jury that "nothing was brought out as testimony" regarding why there is not audio. *Id.* Instead, the prosecutor made a reasonable response to Hill's speculation about the lack of audio by arguing that the jury does not know what the regulations are in the marijuana industry. This is a reasonable inference considering the jury heard testimony that Urban Bud was a marijuana dispensary that had heavy regulations. RP 434; see *Gregory*, 158 Wn.2d at 810. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012)("[T]he State has wide latitude to argue inferences from the evidence."). The deputy prosecutor's comments were not improper as they correctly argued that the jury should not decide the case based on evidence that had not been admitted at trial.

Even should this Court find that the deputy prosecutor's comments were improper, Hill fails to prove the remarks resulted in actual prejudice. Whether a defendant is prejudiced is analyzed under two different standards depending on whether the defendant timely objected at trial. *Scherf*, 192 Wn.2d at 393. If the objection is timely, the defendant must "show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Id.* Failure to object to alleged misconduct, however, "constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not

have been neutralized by an admonition to the jury.” *Russell*, 125 Wn.2d at 86. Therefore, if a defendant fails to object at trial, he must prove (1) the misconduct was flagrant and ill intentioned, (2) no curative instruction could have removed the prejudicial effect, and (3) the resulting prejudice had a substantial likelihood of affecting the jury’s verdict. *Scherf*, 192 Wn.2d at 394.

Hill fails to show that the first alleged instance of prosecutorial misconduct was so flagrant and ill-intentioned that no curative instruction could have neutralized the prejudicial effect. Hill failed to object to the prosecutor’s remark, “I submit that is not sufficient.” RP 515. Therefore, to show prejudice, Hill must prove that the comment was so flagrant and ill intentioned that a curative instruction could not have neutralized the prejudicial effect. *Scherf*, 192 Wn.2d at 394. Had Hill objected, however, the court could have reinstructed the jury that the State has the burden to prove each and every element of the crime charged. There is no reason to believe that such an instruction would not have worked as a “jury is presumed to follow the court’s instructions”. *Gauthier*, 189 Wn. App. at 39.

Further, there is no evidence to support, nor does Hill even suggest, the notion that the prosecutor’s comments were ill-intentioned. Hill’s reliance on *State v. Fleming* is misplaced for two reasons. First, the Court in *Fleming* fails to analyze whether a curative instruction could have neutralized any prejudice. *State v. Fleming*. 83 Wn. App. 209, 921 P.2d 1076 (1996). Since *Fleming* was decided the Supreme Court has repeatedly noted that if a defendant fails to

object, there can only be sufficient prejudice if it was so severe that a curative instruction could not possibly cure the prejudice. See *Scherf*, 192 Wn.2d at 394; *Emery*, 174 Wn.2d at 761; *Lindsay*, 180 Wn.2d at 430; *Stenson* 132 Wn.2d at 719.

Second, the prosecutor's statements did not place a burden on the jury to find Hill guilty. In *Fleming*, the prosecutor directly put a requirement on the jury to find the defendant not guilty: "for you to find the defendants...not guilty...you would have to find either that [D.S] has lied about what occurred in that bedroom or that she was confused." *Fleming*, 83 Wn. App. at 213. This is not the case here. The prosecutor never placed any requirement on the jury to find Hill not guilty. RP 515. The prosecutor merely indicated that Hill's argument against Franada's credibility was insufficient to call into doubt the truth of his testimony. *Id.* This must also be viewed in the greater context of the prosecutor's closing arguments where he repeatedly reminded the jury of his duty to prove each element beyond a reasonable doubt. RP 486-88, 496-97, 524. Therefore, Hill fails to prove that this first instance of alleged misconduct resulted in actual prejudice.

Likewise, Hill fails to demonstrate that he was prejudiced by the prosecutor's comments regarding the lack of audio in the security footage. "A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict." *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). There is nothing to support Hill's argument that

the reason why the video did not have audio played any significant role in the trial or in the jury deliberations.

Whether or not the video contained audio had little importance in the case, let alone the reason why the video lacked audio. Salaverry, Muridan, and Thomas all testified that they witnessed Hill enter the store unlawfully. RP 202-04, 272-76, 346. All three witnessed Hill smash the display merchandise. RP 216, 279, 352. All three witnessed Hill injure Salaverry as well as the resulting bite wound to Salaverry's left forearm. RP 206, 278, 351. Furthermore, the entire crime was captured on camera from multiple angles. Ex. 31. The video corroborated the account of all three witnesses as it displays Salaverry and Muridan gesturing for Hill to exit the store before he rushed past security, kicked Salaverry in the head, and smashed multiple display cases. *Id.* Any speculation regarding why the video does not include audio does not alter any of these facts. Therefore, there is not a substantial likelihood that the misconduct affected the jury's verdict. This Court should deny Hills claim and affirm his convictions.

D. This Court should affirm Hill's sentence because he did not object to the trial court's sentencing procedures and fails to prove a manifest constitutional error

Trial courts have considerable discretion under the sentencing reform act so long as they comply with the strictures of the statute and general principles of due process. *State v. McFarland*, 189 Wn.2d 47, 65, 399 P.3d 1106 (2017). RCW 9.94A.585(1) prohibits appealing a standard

range sentence. Courts, however, have allowed exceptions to the SRA's prohibition on appeals of standard range sentences, if the appellant can show that the sentencing court either failed to follow a specific procedure required by the act or violated a defendant's due process rights. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) ("While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered."). Hill, however, failed to object to the court's procedures at sentencing and there is nothing in the record to indicate the trial court did not consider the mitigating circumstances Hill presented.

Generally, appellate courts will not consider an issue that a party raises for the first time on appeal unless it is a manifest error affecting a constitutional right. *A.M.*, 194 Wn.2d at 38. Under RAP 2.5(a)(3), "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *O'Hara*, 167 Wn.2d at 98. Hill's claim that the trial court did not consider his request for an exceptional sentence is of a constitutional dimension as it affects his right to due process. The error, however, is not manifest because there is nothing in the record to indicate that the judge refused to consider the mitigating circumstances.

A trial court's rejection of mitigating factors in order to sentence a defendant within the standard range is not subject to appeal. *State v. Duke*, 77 Wn. App. 532, 536, 892 P.2d 120 (1995). A trial court only abuses its discretion if it categorically refuses to consider an exceptional sentence. See, e.g., *Grayson*, 154 Wn.2d at 342; *Mcfarland*, 189 Wn.2d at 56 (finding a trial court abuses its discretion if it *categorically* refuses to impose an exceptional sentence or if it "operates under the mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence"). There is no indication in the record that the trial court either categorically refused to consider a mitigated sentence or had a mistaken belief that it did not have the authority to do so.

The record reflects that the court considered the individual aspects of Hill's case and decided that a standard range sentence was appropriate. The court listened as Hill's attorney presented the basis for the exceptional downward sentence. RP 561. The court also provided Hill the opportunity for allocution. RP 562-64. The court engaged in a specific analysis of Hill's culpability and noted that he was concerned about Hill's extensive criminal history with over nine felony points. RP 564-65. He engaged in a conversation with Hill to see whether Hill had a plan on how to change his behavior and attitude so that it would not happen again. RP 565-66. Although the court did not specifically state—"I have considered and reject

Hill's request for an exceptional downward sentence"—the court's extensive colloquy with Hill reflects that the court considered Hill's request for an exceptional downward sentence and simply opted not to give it. Therefore, there is no manifest violation of Hill's due process rights. As such, this Court should affirm Hill's sentence.

E. Hill is not entitled to relief under the cumulative error doctrine because there was not an accumulation of prejudicial error

Under the cumulative error doctrine, a defendant may be entitled to a new trial if a combination of trial errors fundamentally denied the defendant the right to a fair trial. *Lui*, 188 Wn.2d at 565. "Cumulative error may call for reversal, even if each error standing alone would be considered harmless." *State v. Thorgerson*, 172 Wn.2d 438, 454, 258 P.3d 43 (2011). Cumulative error, however, only requires reversal if "the totality of circumstances *substantially* prejudiced the defendant and denied him a fair trial." *In re Per. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014) (emphasis added). The defendant bears the burden of proving (1) multiple trial errors, and (2) that the combination of errors resulted in substantial prejudice that affected the outcome of the trial. *Id.*; *Lui*, 188 Wn.2d at 565 (finding the petitioner "bears the burden of showing the accumulated prejudice from multiple trial errors resulted in substantial prejudiced that denied him a fair trial.").

The doctrine of cumulative error does not apply because Hill fails to establish how the combined instances of error or misconduct affected the outcome of the trial. *Thorgerson*, 172 Wn.2d at 454. Here, Hill provides no argument as to how the combined effect of the alleged errors caused substantial prejudice or altered the outcome of the trial. Br. of App. at 33-34. Instead, Hill cites to a series of cases that involved multiple significant errors that each caused clear prejudice, and whose combined effect denied those defendants a fair trial. That is not the case here. Hill fails to prove his trial was tainted with multiple errors or how their combined effect denied him a fair trial. Rather, this case is akin to *State v. Weber*, which found that the doctrine of cumulative error does not apply “where the errors are few and have little or no effect on the outcome of the trial.” *Weber*, 159 Wn.2d at 279.

Further, if the evidence against a defendant is overwhelming, there can be no prejudicial error under the cumulative error rule as any potential prejudice would be unlikely to alter the outcome of the trial. *Cross*, 180 Wn.2d at 691. The prosecutor’s conduct here was proper, Hill fails to demonstrate any prejudice, and the evidence against Hill was overwhelming in light of the multiple witnesses, video evidence, and Hill’s own admissions. Accordingly, the cumulative error doctrine does not apply and this Court should affirm Hill’s convictions.

V. CONCLUSION

The trial court did not abuse its discretion in denying Hill's motion for a mistrial because the alleged misconduct inhered in the verdict and did not amount to actual juror misconduct. Hill's conviction for burglary in the first degree should be affirmed because there was sufficient evidence, when viewed in the light most favorable to the State, for a rational trier of fact to find Hill entered Urban Bud unlawfully. Hill failed to prove that the prosecutor's closing remarks were either improper or prejudicial as they fairly responded to Hill's own closing argument. There is no basis for this Court to remand for resentencing because there is nothing in the record to support Hill's argument that the trial court refused to consider his request for a mitigated sentence. Since Hill failed to show any prejudicial error, let alone an accumulation of prejudicial error, he is not entitled to the relief

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under the cumulative error doctrine. Therefore, the State respectfully requests this Court affirm Hill's convictions.

RESPECTFULLY SUBMITTED this 2nd day of September, 2020.

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9-2-20 s/Therese Kahn
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

September 02, 2020 - 1:04 PM

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Appellate Court Case Title: State of Washington, Respondent v. Robert Jesse Hill, Appellant
Superior Court Case Number: 19-1-03352-7

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